Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: June 1, 1998
CASE NO: 97-INA-465

In the Matter of:

CHERRYLEE LODGE
Employer

On Behalf of:

VICTORIA LINGAT ADLAO
Alien

Appearance: David M. Sturman, Esq.
Encino, CA
For the Employer and Alien

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. §656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by §212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. §656.27 (c).

Statement of the Case

On September 29, 1994, Cherrylee Lodge ("employer") filed a labor certification application to enable Victoria Lingat Adlao ("alien") to fill the position of Licensed Vocational Nurse (LVN) at an hourly wage of $13.02. The job duties are described as "standard LVN nursing duties," and the job requirements are one year of experience in the job offered along with an LVN license. The employer also required the incumbent to possess experience with psychiatric patients, Alzheimer's patients, and locked facilities (AF 30).

On April 9, 1996, the CO issued a Notice of Findings proposing to deny certification. The CO cited a violation of §656.21 (b) (6) which provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. The CO found that the employer failed to provide lawful, job-related reasons for rejecting Applicants Jane Zafra, Gloria Williams and Zondra Brooks. The CO also cited a violation of §656.21 (b) (5) which provides that the employer must show that the job requirements represent the minimum requirements for the job. The CO found that the employer's special requirements were not the true minimum requirements because at the time the alien was hired, she did not possess experience with psychiatric patients, Alzheimer's patients, or locked facilities. Closely related, the CO determined that the employer failed to comply with §656.21 (b) (2) (I) (A) which requires the employer to document that the job opportunity has been and is being described without unduly restrictive job requirements. Specifically, the CO determined that the requirements that the incumbent possess experience with psychiatric patients and locked facilities was unduly restrictive because they were not consistent with the occupation of licensed nurse.

In rebuttal, dated June 11, 1996, the employer argued that the U.S. applicants were lawfully rejected because none of them met the stated requirements. The employer also contended that the requirements of experience with psychiatric patients and locked facilities are appropriate and normal for the position and thus meet the business necessity test of *Information Industries*. In support of this assertion, the employer provided the opinion of Mr. Robert Schwartz who is administrator of the facility and has over 25 years of experience in providing health care. Mr. Schwartz noted that the employer's facility deals with seriously mentally ill patients who pose a safety threat to the public and the facility's staff (AF 16). He also noted that if the facility fails to employ workers who possess the necessary training and experience, it could expose the hospital to substantial liability (AF 16).

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

The CO issued the Final Determination on August 19, 1996 which denied certification. The CO found that the employer failed to rebut satisfactorily the issues raised in the NOF (AF 13). Noting that the employer admitted that Applicant Brooks was qualified for the position, the CO found that the employer failed to give a lawful, job-related reason for rejecting this applicant. The CO also found that the employer provided no evidence indicating that it operates a facility with psychiatric patients and locked facilities. The CO thus concluded that the special requirements were unduly restrictive. Lastly, the CO found that the employer failed to address the minimum requirements issue on rebuttal.

On September 20, 1996, the employer requested administrative review of Denial of Labor Certification (AF 1).

Discussion

The issue presented by this appeal is whether the employer provided lawful, job-related reasons for rejecting Applicant Brooks under §656.21 (b) (6); whether the job requirements are the minimum necessary to perform the job duties under §656.21 (b) (5); and whether the job requirements are unduly restrictive under §656.21 (b) (2) (I) (A).

Generally, an employer must show that U.S. applicants are rejected solely for lawful, job-related reasons. §656.21 (b) (6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. §656.20 (c) (8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. §656.2 (b).

The Board has held that an applicant is to be considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd*., 88-INA-321 (Feb. 7, 1990); *Microbilt Corp*., 87-INA-635 (Jan. 12, 1988). Moreover, the Board has held that an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *Sterik Co.*, 93-INA-252 (Apr. 19, 1994); *American Cafe*, 90-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990); *Richco Management*, 88-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 88-INA-29 (Apr. 7, 1988).

In the Final Determination, the CO found that Applicant Zondra Brooks was qualified for the position. According to her resume, Ms. Brooks is a licensed vocational nurse with more than five years of experience in the health care industry, including a year of employment with a mental health facility (AF 46-47). Despite this experience, Ms. Brooks indicated in a state employment survey that she was never contacted by the employer (AF 48). The Board has held that where an applicant's resume shows a broad range of experience, education, and training that raises the possibility that the applicant is qualified, although the resume does not expressly state that he or

she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*). We find Ms. Brooks was sufficiently qualified to merit the employer's further investigation of her credentials. Because the employer failed to document adequately the reasons for rejecting Ms. Brooks, certification cannot be granted and further examination of the other reasons cited by the CO is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

Judge Pamela L. Wood, concurring:

I concur in the result because the alien did not possess the required experience working with psychiatric patients, Alzheimers patients, and locked facilities prior to her employment with the Employer, and the Employer has failed to demonstrate that it is now feasible for it to train a U.S. worker such as applicant Brooks, in accordance with 20 C.F.R. § 656.21(b)(5).

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not

favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.